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BRIEF OF PETITIONERS

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 12-19

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 24

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 25

HEBER KIMBALL CLEVELAND, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 26

DAVID BRIGHAM DARGER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 27

VERGIL V. JESSOP, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

(CONTINUED ON SECOND COVER)

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH DISTRICT

PETITION FOR CERTIORARI FILED JANUARY 26, 1945.
CERTIORARI GRANTED MARCH 12, 1945.

SUPREME COURT OF THE UNITED STATES

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VERGEL Y. JESSOP, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 28

THERAL RAY DOCKSTADER, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

No. 29

L. R. STUBBS, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

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FOLLIS GARDNER PETTY, PETITIONER,

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WILLIAM CHATWIN, PETITIONER,

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EDNA CHRISTENSEN, PETITIONER,

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THE UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH DISTRICT

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BRIEF OF PETITIONERS

OPINIONS BELOW

U. S. v. Cleveland, D. C., Utah, 1944, 56 F. Supp. 890.
U. S. v. Cleveland (C.C.A. 10), 146 F. 2d 730.

STATUTES INVOLVED

Section 2 of the Act of June 25, 1910, c. 395, 36 Stat. 825 (18 U. S. C. 398), known as the Mann Act, provides in part:

> Sec. 2. That any person who shall knowingly transport or cause to be transported, or aid or assist in obtaining transportation for, or in transporting, in interstate or foreign commerce, * * * any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice; * * * shall be deemed guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment of not more than five years; or by both such fine and imprisonment, in the discretion of the court.

The Federal Kidnaping Act of June 22, 1932, c. 271, 47 Stat. 326, as amended by the Act of May 18, 1934, c. 301, 48 Stat. 781 (18 U. S. C. 408a), provides in pertinent part as follows:

> Sec. 1. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or

(2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine:

* * *

JURISDICTIONAL STATEMENT

These cases involve the applicability of the White Slave Act and the Lindbergh Kidnaping Act to a given state of facts in which the defendants, married in religious polygamy, freely crossed state lines with their wives and children as their respective vocations demanded.

Not one of the defendants is here charged with polygamy, nor is his defense in any degree based on either the propriety or desideratum of plural marriage.

The defendants do not assert that they may practice polygamy in violation of a state law, but they do insist that such marital status is neither the concern of the federal government in states, nor can it be made the *raison d'etre* of a White Slave Act prosecution.

We do have here, nevetheless, the question: Does a sincere religious practice of polygamy constitute a sale of unwilling female flesh, such as that contemplated by Congress when it enacted the White Slave Act, or is it a voluntary form of marriage solely within the jurisdiction of the States?

The petitioners earnestly contend that no power was ever delegated to the federal government:

(a) To declare upon the validity, or morals, or any form of religious marriage;

(b) To determine the verity of any religious tenet respecting any type of marriage;

(c) To ban, or punish, the practice of any pattern of religious marriage.

Such power never has been given to the federal government, either directly or by necessary implications; hence it dwells yet with the States and that ultimate repository of freedom—the people.

Given an inch of authority under the White Slave Act, ardent federal prosecutors strayed miles in the expression of their power, and it has taken lawyers a generation to herd them back to the original corral of Congress, which was "the sale of unwilling female flesh".

The delegation of the power to regulate interstate commerce was never intended to establish a police regulation over the marital affairs of the people. The Fathers wisely reserved that matter to the respective states; therefore, the violation of a State enactment against an act *malum prohibitum*, cannot furnish the essential guilty mind and intendment to the commission of a federal crime *malum in se*.

The courts have, in effect, held that the sale of involuntary female flesh, and the transportation of it across state lines for immoral purpose, is within the purview of the commerce clause; but they cannot so hold with respect to family life, children and marriage. Only the States can supervise that relationship.

Various marriages are illegal in different states—Negro with White; Oriental with White, and so on—; yet the federal government does not prosecute such people under the Mann Act when they travel from state to state; neither should it here, where the marriage involved is not *malum in se*, but merely *malum prohibitum*.

It is therefore to lasso too ardent public prosecutors and bring them, with all their selfish influence, to the original Congressional corral of the Mann Act—the sale of unwilling female flesh—that the decision of this lofty court is sought. Its reversal of these cases will not be in any sense a ratification of polygamy, but a determination to keep the White Slave Act within that horrifying stockade of involuntary prostitution originally intended. The federal courts must not be cluttered with the voluntary marital affairs of the people else we shall soon see the White Slave Act involved with the legalities and illegalities of divorce decrees.

Technically the jurisdiction of this Court is based on the following: On January 4, 1945, judgments in these cases were entered by the Circuit Court of Appeals (Tenth

Circuit), (R. 123-128). On January 30, 1945, petition for writs of certiorari was filed, and under the authority of Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, and Rules XI. and XIII. of the Criminal Appeals rules of this Court of May 7, 1934, the petition for Writs of certiorari was, on March 12, 1945, granted. The defendants entered pleas of "not guilty" to every charge.

POINTS TO BE URGED

THE COURTS BELOW ERRED IN:

1. Refusing to sustain the Petitioners' challenge to the Grand Jury.

2. Finding that any of these cases comes within the legislative intendment of Congress in enacting the White Slave Act.

3. Finding that any of these cases comes within the legislative intendment of Congress in enacting the Lindbergh Act.

4. Holding that the true bills, or any one of them, informed the defendants of either: (a) the nature, or (b) the cause of the charges laid therein.

5. Failing to sustain the contention of Petitioners' Motion to Quash the true bills, under the issues here raised that:

   (a) The true bill stated facts insufficient to charge any crime;

   (b) The true bills contain nothing other than conclusions of law, not supported by any proper or required facts.

6. Finding by inference only that the doctrines announced by the Prophet Joseph Smith were false and immoral, and within the purview of the White Slave Act.

7. Entertaining and determining issues based on marriage and domestic relations.

8. Finding that the violation of a police statute of Utah carried with it the necessary criminal intent to debauch,

or prostitute.

9. Failing strictly to construe these criminal Acts, and to apply the rule of *ejusdem generis* thereto.

10. Finding that the motivating motive in transport across state lines by any defendant was an intended immorality.

11. Determining the status of Mormon "celestial plural marriage" as constituting any form of either prostitution or debauchery, within the meanings to be given those words in the Mann Act.

12. Finding any advantage, gain or profit, as contemplated by the Lindbergh Act, was here present in any of the charges here laid thereunder.

13. Determining the verity of religious dogmas here involved.

15. These prosecutions constitute cumulative penalties.

SUMMARY OF MATERIAL FACTS

These cases were tried by the Court, sitting itself as a jury, upon stipulations of what the government's testimony would be. There were eight Mann Act and three Kidnaping Act cases; and the defense in all but one case (Cleveland R. 40) was that the women involved were all plural wives of the petitioners at the time of crossing state lines (one of them with eight children having been such since 1928), that in crossing state lines there was no purpose or intent to violate either of said Acts, and that, since the government has no control over marriage, neither the White Slave Act nor the Kidnaping Act had any application to the facts here. Pleas of "not guilty" were entered in all cases.

The District Court took all of the stipulations under advisement, and after rendering an opinion covering all of the cases as a group, found all of the defendants guilty.

The testimony is short and may be found at Record pages 7, 56, 72, 80, 97, 108, and 129. We deem it inadvisable to repeat it here; after our main brief herein we have,

however, discussed each case individually, preceding it with a summary of what we regard as the material facts. These summaries are found at pages 30 to 55 *infra*.

HISTORY OF THE WHITE SLAVE ACT

Tersely expressed, the history of the White Slave Act is as follows:

(a) In 1910, the Immigration Commissioner reported that, under the promise of legitimate employment, European girls were being imported, and then, to their helpless dismay, sold to houses of prostitution in Chicago and New York, where stripped and beaten, they were held in horrible slavery, and the use of their unwilling bodies sold;

(b) Edwin W. Sims, U. S. District Attorney at Chicago, called the attention of Congressman Mann to the frightful situation;

(c) Mr. Mann introduced his bill, and the only opposition was from Southern congressmen who feared encroachment on State rights.

All this is set forth in Congressional Record (1910), Vol. 45 at pages 545, 546, 547, 548, 550, 805, 822, 1035 and 1037, and House Committee Report 47.

We have read every word of that debate, and never once was polygamy mentioned, despite the then recent Smoot investigation; indeed we feel that this Court has recently itself gone into the whole very thoroughly and must agree with that statement.

To hold polygamy, as practiced by these petitioners under the original doctrines of the Mormon Church, to be debauchery or prostitution, were to bastardize the rich blood of half of the people of Utah, including that of its most illustrious national citizens. Since Utah ranks first in per capita "Who's Who" of men of education and science, dare we stigmatize half of that laudable personnel with the epithets "sons of debauchery and prostitution"? The indignation of an appreciative nation—appreciative of art, music and science—would say "No!" Yet that is

the problem here—whether to make celestial marriage a species of prostitution and debauchery. Call it illegal—yes; but not prostitution.

If construction of the statutes were to ignore the rule of *ejusdem generis,* and hold "that other immoral purpose" means something besides "prostitution" and "debauchery", indeed anything forbidden by state statute, then we have this astonishing result:

Imagine a recreational park through which a state line runs. States X and Y forbid smoking by girls under 18. Jones, at a Fourth of July celebration, drives half a dozen girls under 18 over the line so that they may purchase a package of cigarettes at a stand which has them on hand. He is guilty under the Mann Act because states X and Y says he is contributing to the delinquency of minors—an immorality.

Another man takes his young friends over the line for wine, the imbibing of which, by minors, is forbidden in both states. He is guilty under the Mann Act.

In other words, common sense tells us that the White Slave Act intended to hit prostitution and debauchery only, and not to punish people's voluntary actions, even when such are prohibited by the states. To sustain these convictions merely on the ground that what the defendants did was regarded as "immoral", were to open the Mann Act wide, and make travel from state to state a perilous undertaking. Where in all these cases is there the slightest evidence of "slavery", indeed of anything but a happy, voluntary marital status with children?

To determine what is moral, and what immoral, is most difficult. Some will say that the answer is *autonomus* in the human mind, working (a) empirically as a result of its long experience, or (b) rationally more or less without the assistance of experience, or (c) intuitively in accordance with conscience. Others will maintain that the answer is *heteronomous;* that is, based on some authority *outside* of the mind. These would insist that what is moral must be determined by (a) social sanction in accordance with custom and tradition or (b) political sanction, as set forth

by the state in its laws, or (c) religious sanction as commanded by the law of God.

These petitioners believe that any citizen is justified in determining what is moral by using any of those six criteria, and that no court may hold that the criterion chosen is the exclusive and correct one. Indeed, petitioners claim that their practice of plural morriage not only complies with their experience, their conscience and their reason, but also it is commanded by their God, and only state courts may say "no". A federal court has no statutory enactment concerning what is moral nor can it fix it upon such a varying thing as custom. It knows that conscience is largely a matter of environment, and intuitive promptings, mostly a question of geography.

It is not too much to say that the criterion ethical, the public or private moral, has confounded philosophers since earliest times; indeed such modern writers as Prof. G. E. Moore (*Principia Ethica*) and William David Ross (*Nicomachean Ethics*) have given up defining the ethical test and denied the existence of any single moral criterion. They have had the benefit of ethical writings from Aristotle to the present time; and have still found themselves unable to give a definition. One now a professor at Cambridge, the other until his death, an editor at Oxford, they are not little men. On the one side we have axiological theories determining what is right by the value of the action; on the other, deontological theories, basing it on intuition. We drift from Price, Reid, Clarke, Sidgwick and Ross to Cumberland, Butler, Whewell and Martineau, and still do not know what is morality, and much less public morality. When we stood and watched the smoke uprise from the cremation of the body of Herbert Spencer in London, we thought he had found an answer in his "Ethics"; yet now we know even he had no definition of morals. It is a difficult road; yet the lower Court solved all its problems with a word. It is not surprising then that philosophers have finally coined the words, "autonomy of ethics" based on the theory that ethics is not a part of, and cannot be derived from, either metaphysics or any of the social or natural sciences.

If, therefore, the word "immoral" in the Act does not refer to "prostitution" or "debauchery", this Court is driven to the necessity of defining "immoral"—a task which has caused the brow of man to sweat since the dawn of history, without definite results.

This Court may frown upon the practice of polygamy as contrary to the accepted habits of modern America; yet it has but one duty—to determine whether the Mann Act had such marital status and association in view. The very thought of prostitution is contrary to the words: "man", "beloved wives" and "beloved children"; and a recourse to biology lends little comfort to the frown. Until the laws of the states change, there can be no legal practice of celestial marriage, but in the meantime, to place it in the category of prostitution is to belie its history.

The sole place which any reference to plural marriage can properly have in these matters, is to prove, if such be allowable, an immorality of the kind banned by the federal statutes involved. Certainly the Lindbergh Act has no place upon this subject.

Each of the federal statutes herein, being penal and unknown to the common law, requires a strict construction. If a liberal construction be permitted, and the Courts be allowed to superimpose their own ideas upon the legislative intent;—if the rule of *ejusdem generis* be not strictly applied here—, they will have given sanction to a form of statutory construction to all intents and purposes declaring it fit and lawful for courts to legislate directly, by private judicial interpretation,—a doctrine abhorrent to all American jurisprudence—; and at the same time will have created a form of procedure under which all religious freedoms, all protection of the same by the Constitution will by private construction, interpretations and expansions, be rendered sterile and ineffective; and eventually, by this same means, they will have made possible a State religion by judicial declaration that all other forms than it are immoral!

If the judgments below be here affirmed where will this form of law end? Who can depend upon the Constitu-

tional protections of religious thought? When will others than these religiously ardent people, those who represent great bodies of citizens not of an orthodox faith, be subjected to a subsequent and worse form of statutory construction? How long will freedom of religious thought remain? How long can civil government remain, in Utah, or elsewhere, free from absolute domination by ecclesiastical authority?

These are questions of broad import. They are here presented for the first time in this concrete form. They require a clear declaration that such was not within the legislative intent of the Congress in its enactments of either of the statutes here involved; was not intended to fall within the direct, or the incidental, powers conferred on the federal government to "regulate" commerce. Affirming this decision, will be to declare power in the federal government, by clear and unequivocal police statutes, not finding their basis in such delegated powers, to regulate not only these people in their religious beliefs and practices, but also all citizens with dissident ideas on questions of religious morality crossing state lines.

Regulation of the religious marital actions of citizens, by the federal government has no place in the history of our people; it rests exclusively within the functions and prerogatives of the sovereign states.

The affirming decision in the Camannetti case came as a distinct shock to many lawyers. The legislative intent there made out required a stretching of that intent to almost the breaking point. And, in that case, there appeared no religious question—no doctrine sincerely believed by the defendant to have been the actual and binding command of the Almighty.

The cases now at bar are far removed, in principle and in fact, from that case. We affirm that that case is not in point at all on the question of the required guilty mind here necessary to be specifically shown, else we have a federal statute declared to be a proper and Constitutional police regulation, not requiring any support in the great power to regulate "commerce" (for it is only in the mat-

ter of crimes made so by a police statute that the mere knowledge of the ban and a knowing violation of the ban, can supply the necessary *mens rea.*) Also, we shall have a violation of a police regulation as to the speed of automobiles on the highway showing an intent to do an immoral act.

Of course, no one can seriously contend that the mere violation of any police statute forbidding the doing of an act merely *malum prohibitum* can carry with it the necessary criminay intent essential to the conviction of a crime *malum in se.*

The criminal intent to do an immoral act—to "prostitute" or "debauch" in the cases here—must be made to appear, as well as the physical act so banned. Only the latter appears.

Examination of the religious beliefs of these defendants in the divinity of the command of God as given through Joseph, the Mormon Prophet, being connected with the showing of their acts here, can lead to but a single conclusion:—

No one of them intended to offer any of these women to commercial sexual indulgence; no one of them intended any man so much as to suggest an approach to any one of these women; all believed that the practice of the forms of vice banned by the White Slave Act was, and is, most reprehensible; no sexual relationship was indulged by any defendant until after an established "celestial" marriage, and the exclusive possession of the woman by the man entering into that relationship, completely believed by both the man and the woman to be actually "the law of God".

No definition, which we have been able to discover, so much as intimates that such acts, under such beliefs, can possibly make out any "prostitution", or any "debauchery", of a woman so "married".

A new definition of each of those terms must be coined in order to affirm these convictions.

A new definition of the required "criminal intent" must

be declared in order to find any such here present in the minds of these defendants.

As well say that the Roman Catholics were "immoral" in their determination to continue to import sacramental wine, despite the Volstead Act, as to declare here these defendants to have had a conscious mental determination, or intent, to "prostitute" or "debauch" these loved "wives".

As well determine the same great Church to be immoral in its declared doctrine that its members must obey the law of God when the same falls under the inhibition of the civil law, as to find here these petitioners immoral in their same sincere religious principles; and then, without more, declare them to have had the requisite "guilty mind", and the specific criminal intent, to violate the ban of either the Mann Act or the Lindbergh Act. To hold so must be to institute a new jurisprudence in these United States.

That the beliefs of these defendants appear "ugly" to many, cannot supply the essential *mens rea*. That is a mere difference in present view. (See: the "American Magazine", March, 1945.) Many of those who would so regard these acts as "ugly", are descended from proud American mothers and grandmothers of the like ages at marriage.

A clear summation of all of the White Slave Act cases shows that an illegal sexual indulgence, incidentally continued in the crossing of state lines for some other distinct and primary reason, cannot be held a violation of that Act. A "prostitution", or a "debauchery", in the commonly accepted meanings of those words, must appear as the actuating motive, and the usual meaning of those terms must be shown to have been accomplished under that impelling motive. A mere continuance of an existing voluntary illegal sexual status between the same man and the same woman, and an incidental crossing of the state lines, cannot constitute a violation of the Act. Here, in every case save one, the status of "celestial" marriage was of long and exclusive duration between these men and their transported "wife", prior to the transportation.

In the one case (No. 896): If prostitution or debauchery had been the actuating motive of Cleveland, why did they await the performance of a "celestial marriage" before sexual relations were indulged? Surely, had either Cleveland or the woman been inclined to either "banned form of life", no waiting period would have been tolerated by either. Common sense, and our experience in life, give that as the unquestionable fact.

Now, let us see just what these men and women, their "celestial wives", did believe, and what actually was their intent in entering into the forbidden "marriage":—*

> "They accuse me of polygamy, of being a false prophet, and many other things which I do not now remember; but I am no false prophet; I am no imposter; I have had no dark revelations; I have had no revelation from the Devil; I made no revelations; I have got nothing up of myself.
>
> "The same God that has thus far dictated to me and strengthened me in this work, gave me this revelation and commandment on celestial and plural marriage and the same God commanded me to obey it."
>
> Joseph Smith, the Prophet, in the Contributor, Vol. 5, p. 259.

Continuing, in the same declaration, supra, the Prophet said:—

> "If I do not practice it I shall be damned with my people. If I do teach it, and practice it, and urge it, they say they will kill me and I know they will. But we have got to observe it. It is an eternal principle and was given by way of commandment and not by way of instruction."

The "Contributor" was an official publication of the Mormon Church.

The "Doctrine and Covenants" of the "Mormon" Church is before the Court. (By judicial notice. See:

*We have placed as an Appendix hereto a summary of the religious history of the defendants.

Hilton v. Roylance, 25 Utah 129, 69 Pac. 660.) Its Section 132 is the part that contains the "revelation" of the Prophet Joseph Smith, to which he refers in the above statement. By its terms, it commands obedience to its precepts, and makes plural marriage essential to exaltation in the celestial kingdom of God.

The "Key to Theology", a Mormon publication written by their beloved Apostle Parley P. Pratt, whom that people have regarded as an Apostle Paul, says:

> "The principal object contemplated by this law is the multiplication of children of good and worthy fathers, who will teach them truth, and train them in the holy principles of salvation." (pp. 171-172)
>
> "A daughter of Israel, who, by *prostitution*, was rendered unworthy or unqualified for the duties of a virtuous wife and mother, was considered unfit to live; while the male who would thus trifle with the fountain of life and contribute to render a female unworthy to answer the end of her creation, was also condenmed to death." (p. 172)
>
> "If we except murder, *there is scarcely a more damning sin on earth than the prostitution of the female virtue or chastity at the shrine of pleasure or brutal lust.* * * *" (p. 174)

One of the present-day pre-eminent leaders of the Mormon Church, the Honorable J. Reuben Clark, Jr., a former Under-secretary of State of the United States, and ex-Ambassador to Mexico, under date of April 15th, 1944, said:

> "We of the Latter-day Saints have everything, or we have nothing. There is no middle ground. We know that Joseph Smith was the Prophet of God. We know that the Father and the Son came to him * * *".
>
> "Deseret News" (the Church newspaper)
> Church Edition, p. 13
> (Issue of April 15, 1944.)

An authoritative Mormon Church work is the "Compendium". Its statements have had acceptance among that

people for near a hundred years. From it, we quote:

> "We cannot presume that the Lord ever gave women to these men under any title, except for the noble purpose of parentage. *Concubinage is unknown among the Latter-day Saints.* Wifehood, in the fullest sense of the word, is conferred by the marriage covenant. All a man's children are his legitimate heirs both by law and custom."
>
> "Compendium", p. 137.

A great Englishman, commenting upon this phase of "Mormonism", has said:—

> "* * * I do not know any more moving passage in literature than that in which Brigham Young described how, after the appalling order, he met a funeral on his way home and found himself committing the mortal sin of envying the dead. And yet Brigham Young lived to have a very large number of wives according to our ideas, * * * and to become immortal in history as an American Moses by leading his people through the wilderness into an un-promised land where they founded a great city on polygamy.
>
> "Now *nothing can be more idle, nothing more frivolous, than to imagine that this polygamy had anything to do with personal licentiousness.* If Joseph Smith had proposed to the Latter-day Saints that they should live licentious lives, they would have rushed on him and probably anticipated the pious neighbors who presently shot him."
>
> George Bernard Shaw, as quoted in "The Millennial Star" (a Church, Mormon, official publication of England, issue of August, 1944, p. 817)

That the orthodox members of the "Mormon" Church have seen fit no longer to countenance the practice of polygamy, cannot remove the same from its claimed divinity. It is either true, or it is false. If false, it may be immoral. If it is, as it was held to be when announced by the Prophet Joseph Smith, truly the very command of God,

who will say it is immoral unless the Court follows some other moral sanction than the law of God. This Court has neither precedent nor statute upon which it can rely to determine what is moral, or what is the word of God. Who dare say it is the very prostitution and debauchery, the very concubinage, if you will of the Mann Act enactment against the sale of unwilling female flesh?

Having, as is claimed, had a divine origin; being the very word of the Almighty, there exists no court in this Nation which has any authority to gainsay that claim, or to declare the doctrine false, unless the Court be prompted by patterns unknown to the law. It may be forbidden by the States, but who dare call it immoral?

The adjudication of the falsity of the doctrine being first necessary to judicial condemnation of it as immoral, its morality is beyond the powers of any court in the United States to declare upon. It is a religious dogma, and so above any questioning as to its verity by the courts. For all purposes here, the verity of the doctrine must be unquestioned unless the Court adopt a new criterion of morality and abandon the law of God as the highest expression of its true meaning.

Its morality cannot be challenged; FOR GOD'S COMMAND CANNOT BE IMMORAL OR REQUIRE IMMORALITY. And, such being the case, what was the frame of mind present in these victims of a law contrary to a religious tenet which, from birth, they were taught to believe? Here is squarely presented the very complex question as to when man-made law may invade a religious right, or rite.

In all our endeavors, and in every court, and in the administration of every law, we are sworn under the blessings of our God, whatever that God may be, in the performance of governmental duty; every judge, every juryman, every witness invokes the aid of his own God. Why? We do not know unless it is the intent to recognize a Christian God,—*the* Christian God of the subscriber.

The only ground upon which a full denial of these rights can be predicated has been the theory that the state,

local jurisdiction, may define the margin; in other words, the prohibitory law under its police powers; the right of the state as distinguished from the sovereign powers granted to the federal government.

It is conceded by everyone that each one of the petitioners sincerely believed this doctrine above announced, that each was acting under such sincere belief. It is an impossibility for a single mind to have such belief, and at the same time, entertain any such criminal intent as is here required to give application to these statutes.

These convictions must be reversed for the following reasons:

(a) Not to reverse, requires an adjudication of the truth or falsity of the "revelations" of the Prophet Joseph Smith, and a consequent judicial determination that the "Mormon" Church, with its nearly one million members, in the words of the Honorable J. Reuben Clark, Jr., "has nothing",—is a victim of a great hoax.

(b) Not to reverse requires a new jurisprudence in these United States, destroying the long-established requirement of showing the necessary "guilty mind", and "criminal intent", and to abandon thereby those former prerequisites for conviction of any crime *malum in se*.

The White Slave Act covers only acts *malum in se*. The mere violation of a State prohibitory Act cannot supply the intent—the essential *mens rea*, to a conviction under it. It is a fundamental precept that a guilty mind cannot be inferred. The *gravamina* of the offense here charged are "prostitution" and "debauchery"—matters *malum in se*; and intent to commit polygamy, an offense merely *malum prohibitum*, cannot furnish the essential *mens rea* in these cases.*

There lies one of the master questions squarely presented and for the first time. All former declarations upon the vice or virtue of polygamy have not been necessary

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(*See Lawson on Presumptive Evidence, pp. 271-272 16 Corpus Juris, p. 74, Sec. 41 16 C. J. pp. 8-81, Sec. 47 Commonwealth v. Adams, 114 Mass. 323 19 Am. R. 362)

to any determination of those cases in which such appear, and, as agreed by the Hon. T. Blake Kennedy in his memorandum decision, they constitute but *obiter dicta*. (R. p. 13).

Now we ask: Can the Federal Courts so declare at all, and still remain within their powers?

We answer: such cannot be done under our Federal Constitution for the reason that any such declaration would invade the sole prerogative of the sovereign states, whose exclusive function it is to regulate family matters—marriage and divorce—within their respective borders. Hence we have had recent agitation for a constitutional amendment permitting a federal law, making uniform the law of divorce in the United States. Had the Congress such power, there would be no need for that agitation.

Within the past few months this Court has spoken on this subject as follows:

> "The domestic relations of husband and wife * * * were matters reserved to the States. State of Ohio ex. rel. Popovici v. Ogler, 280 U. S. 379, 383, 384, 50 S. Ct. 154, 155, 74 L. Ed. 489, and do not belong to the United States. In re Burns, 136 U. S. 586, 593, 594, 10 S. Ct. 850, 852, 853, 34 L. Ed. 500."
>
> Williams v. State of No. Carolina, 65 S. Ct. 1092, 1096 (Decided May 21, 1945).

If, therefore, the Federal government has nothing to do with the domestic relations of its citizens, does it have power over them if the relations are illegal? If the relations are admittedly illegal is it still solely within the province of the states to handle all matters pertaining to them? The answer involves a definition of the word "domestic."

Ballentine's Law Dictionary says:

> "The word has been variously defined by lexicographers, 'but with substantial uniformity of meaning. Johnson's Dictionary defines it as 'inhabiting the house, not wild.' The Standard Dictionary defines it as 'belonging to the house or household; domesticat-

> ed; tame.' Webster's New International, 'living in or near the habitation of man; domesticated; tame as distinguished from wild; living by habit or special training in association with man.' Century Dictionary, 'relating to or belonging to the home, or household, or household affairs.'"

No one could claim that the defendants in the case at bar with their homes, wives and children, were not living in a domestic relationship as defined above, even though that relationship under the laws of Utah was illegal. The illegality in no way removes its character of domesticity; and if such be the case their actions in that relationship are no affair of the United States government. It is for Utah to define and punish. The cold logic of a contrary position is for this lofty Court to say: We reverse our opinion that the Federal government has no power over the domestic affairs of its citizens and we now assert that the Federal government has jurisdiction over the domestic relations of its citizens when such relations are illegal. But the Constitution never authorized such a distinction: if the affairs are domestic whatever their legality the Federal government has no concern with them.

Any other answer to our question must be an affirmation of the federal power to legislate judicially on the subject of marriage. This would be an unwarranted expansion of the explicit terms and the legislative intent of the Mann Act, of which it is said:

> "We do not here question or reconsider any previous construction placed on the Act which may have let the federal government into areas of regulations not originally contemplated by Congress. But experience with the administration of the law admonishes us against adding another chapter of statutory construction and application which would have similar effect and which would make possible even further justification of the fear expressed at the time of the adoption of the legislation that its broad provisions are 'liable to furnish boundless opportunity to hold up and blackmail and make unnecessary trouble, without any corresponding benefit to society.'"

The Act, and its purposes, are further delimited in the Mortensen case (Mortensen v. U. S., 322 U. S. 369), in the following language:

> "The statute thus aims to penalize only those who use interstate commerce with a view toward accomplishing an unlawful purpose."
>
> "People not of good moral character, like others, travel from place to place and change their residence. But to say that because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance."
>
> "Whatever their faults, petitioners are entitled to have just and fair treatment under the law and not be punished for transporting girls in interstate commerce for a purpose wholly different from any of the purposes condemned by Congress."

The Supreme Court has also said concerning what may not be imputed from any legislation:

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, State or Nation, because this is a religious people. This is historically true. From the discovery of this continent to the present hour there is a single voice making this affirmation."
>
> Church of the Holy Trinity v. United States
> 143 U. S. 457-472 12 Supt. Ct. Rep. 511.

In the face of the foregoing quotations, we ask: How can it be asserted by any court that the Mann Act was designed to serve as a means of suppressing the practice of religious plural marriage?

Nor must we lose sight of the fact that the transportations here, save one only, were but an incident to a continuance of existing relations—but an incident to an established marital status. No conclusion can be drawn that such sort of doings ever occurred to the minds of the Congress which enacted the "White Slave" Act.

If a sovereign state should legalize the practice of plural marriage, could the Federal Courts prevent it? Such question is answered by the Enabling Act of Utah requiring the new state to prohibit polygamy. (Utah Code 1943).

It is clear that Congress never intended that such marriages should be classed as either a form of "prostitution", or held to be a "debauchery". Such matters are

> "Wholly different from any of the purposes condemned by Congress."

All doubt about this last proposition is removed by the declaration of the Supreme Court when it says:

> "Congress was attempting primarily to eliminate the 'white slave' business which uses interstate and foreign commerce as a means of procuring and distributing its victims, and 'to prevent panderers and procurers from compelling thousands of women and girls *against their wills and desires to enter and continue in a life of prostitution.*' Such clearly was not the situation revealed by the facts in this case." (Italics inserted)
>
> (and the Court quotes in part from, and refers to: H. Rep. No. 47 p. 10 (61st Cong., 2d Sess.); and to the same statements contained in S. Rep. No. 886, p. 10, 61st Cong. 2d Sess.) and also to 45 Cong. Rec. 805, 821, 1035, 1037.)
>
> Mortensen v. United States, supra.

To illustrate how some of the courts have been gradually restoring the original purpose of the Mann Act, and how their efforts have at last culminated and achieved vindication in the Mortensen case, we cite the following:

In Gerbine v. United States, 293 F. 754 (CCA 3rd), it was held that the transportation by a married man of a girl from New Jersey to Pennsylvania, for the purpose of contracting a bigamous marriage, was not within the statute. This case is well reasoned, and is in point as upholding the contention of the defendants here.

In Fisher v. United States, 266 F. 667 (CCA 4th), defendant, who was already having illicit relations with a girl in one state, took her into another state for a visit, and brought her back the same day and resumed relations. (Identified with the facts here in case No. 895.) This was held not within the Act—the transportation being merely incidental to the illicit relations.

In Van Pelt v. United States, 240 F. 346 (CCA 4th), it was held that the transportation must contemplate a change of relations, and a change for the worse in the situation of the woman. In other words, to accomplish a purpose not already an accomplished fact.

In Sloan v. United States, 287 F. 91 (CCA 8th), defendant had been having illicit relations with a woman in Illinois. He took her to St. Louis, Missouri, to see her sister. Thereupon he had illicit relations with her in Missouri. The Court said that with the act in St. Louis, the United States was not concerned, and that "there is nothing in the evidence to show any possible reason why he should have gone to the trouble and expense of taking her to St. Louis merely in order to have intercourse with her when he could have done so at home."

To the same effect is United States v. Grace, 73 Fed. 2d 294.

In Yoder v. United States, 80 F. 2d 665 (CCA 10th), the defendant was having illicit relations with the woman, Mrs. Young, in Oklahoma. They went together to Chicago. Mrs. Young testified that the purpose of the trip was to get divorces, and she employed the defendant to go and inspect a garage she thought of buying. The court held that the use of the word "intent" was surplusage, and that the word in meaning is different from "purpose", and that the court erred in charging the jury that "intent" is equivalent to "purpose". The government offered evidence of the immoral purpose—defendant offering evidence that the purpose was legitimate, a business proposition. The court held that, if the purpose of the trip was legitimate, the intent of the defendant to continue in Chicago his relations with Mrs. Young would not warrant a

conviction, and that, if the sole purpose of the trip was proper, the intention to have illicit relations was merely incidental, and did not make out the crime; and cited several cases to which we have referred.

In Drosser v. United States, 16 F. 2d 833 (CCA 10th), defendant took a married woman from Salt Lake City to Anaconda, Montana. It was held that, if the purpose was to marry her there if he could, and he had no intention to have illicit relations with her, he was not guilty, and the conviction was reversed.

In Alpert v. U. S. (CCA, N. Y., 1926), 12 F. (2d) 352, it was held that a journey from one state to another, if followed by illicit intercourse, does not result in violation of the White Slave Traffic Act where the journey was made for wholly different reasons.

(In the cases at bar, the men were earning a livelihood, and the acts complained of were but the incidental continuation of a status already existing.)

In U. S. ex rel Sirchie v. Smith (D. C. Pa. 1943), 52 F. Supp. 610, where it appeared that the defendant and the woman motored from Washington, D. C., to Philadelphia, and then back to Washington, contracting a bigamous marriage in Pennsylvania, and, thereafter, cohabiting at Washington as man and wife, removal was denied on the ground that no offense was committed by the transportation charged.

EJUSDEM GENERIS

If it be the argument of the government, that we are here concerned only with the overt acts of state-line crossings followed by illegal sexual intercourse, and the religious beliefs of the defendants were irrelevant, then why did Congress put the word "purpose" in the Act and how can purpose be determined without ascertaining the minds of the defendants as clearly shown by their words and actions accompanying the crossings? To illustrate: It is erroneously reported that Richard Roe's wife, an army nurse, is killed in France. He remarries within a month, crosses a state line with his new wife and there has sexual intercourse with her. Next day a cable from his legal wife proves her to be alive. His second marriage

is void, and he has committed the overt act of the Mann Act. Does any Court say that his belief, his intent could not be shown? Reverse the facts: John Doe takes his legal wife across a state line to put her in a house of prostitution, and is justly convicted of the Mann Act. Does anyone contend that he could be convicted without showing what was on his mind when he made the trip? Any way one looks at it purpose always involves an investigation of the mind as shown by things disconnected with the actual crossing. The belief of these defendants as indicated by many many things absolutely prove that neither prostitution nor debauchery was on their minds. To confine the proof in Mann Act cases to actual overt acts were to deny the criminal law of intent. Suppose the government replies and says: "Yes, but the trouble is, these people believed in something illegal." Our retort is: "Illegal where? Certainly not under any applicable United States law. The practice of the belief is illegal only in the States where alone it can be prosecuted." The practice is not something *malum in se* like murder but merely something not permitted under state law. No one contends that it is lawful in the states. Congress used the word "purpose" and it meant "purpose", and as Barnabas said when he came to Antioch the important thing was "purpose of the heart" (Acts 11:23) or as Paul put it, "the thoughts and intents of the heart" (Hebrews 4:12).

Robert Jones may physically drive his neighbor's car across a state line, but would anyone contend that he is guilty of the Dyer Act unless it be shown that he had the purpose to steal it?

Now suppose the government in view of these illustrations retreats from its position, that overt acts are alone sufficient without proof of the mental purpose of the defendants. Suppose it concede also as it must from the facts, that there was no proof of intent to commit either debauchery or prostitution, for children and a marital relationship are inconsistent with those terms. We then have the government on the very thin limb of "other immoral purpose". Suppose it be argued that Congress could not possibly have meant those words to include everything illegal or immoral by state statute, such as smok-

ing cigarettes by minors, as that leads to ridiculous conclusions, and suppose further the government contends that the word immoral refers alone to sex. All right; even then, the rule of *ejusdem generis* compels us to hold that the word "immoral" refers to "debauchery", "prostitution" or sexual crimes of the same genus. What are they—surely not voluntary, natural motherhood. They are that host of sexual perversions and unnatural practices that in many instances are so revolting that the great authority Krafft-Ebing in his "Psychopathia Sexualis" gives details of some of them only in Latin. It is such things that Congress had in mind and there is none of it here. This is not clearer than if Congress had inserted the word "similar", and said "debauchery and prostitution and other similar immoral purpose". Associated in the mind of Congress with all these painful and disgusting things were the words "commerce", "sale", "profit" and "slavery". Only the bitterness and the vengeance of sect on sect could ever have given birth to the tragic thought to apply it to these lowly people with their humble homes and healthy children. Certainly no legal reasoning could have prompted it, and even the District Court before passing sentence said in his written opinion: "This in a way forces the court to the unenviable situation of setting in judgment between factions in a church fight." (R. 23). To these defendants prostitution, debauchery, and unnatural sexual practices, constitute the unpardonable sin that would haunt them throughout eternity. We are not here upholding a plurality of wives, even though Prof. C. E. M. Joad of the University of London has within the past few weeks advocated its practice for England (See Associated Press, Salt Lake Tribune, Feb. 25, 1945, D. 7); but we are asserting that a plurality of wives with children in the homes is not that chamber of involuntary horrors that aroused the nation to enact the white slave law. To say so is to belie Utah's history for the past hundred years.

Certainly therefore if the government is forced out upon the thin limb of "other immoral purpose" that limb must give way with the weight of mis-applied law; but as the prosecution falls indignation compels one to enquire who instigated such a monstrosity against these humble peo-

ple? Who first said their lives were comparable with the dens of iniquity? While the intents of the defendants are open the motives of the prosecution have not been quite so clear.*

CUMULATIVE PENALTIES

This Court has frowned upon the imposition of cumulative penalties above and beyond those specified by state law for infractions of a state's criminal code by its own citizens. (U. S. v. Constantine, Ala. 1935, 56 S. Ct. 223, 296 U. S. 287, 80 L. Ed. 233, followed in U. S. v. Kesterson, 1935, 56 S. Ct. 229, 296 U. S. 299, 80 L. Ed. 241).

In the cases at bar nothing new occurred as a result of crossing state lines—there was but a continuation of a marital status sufficiently punishable under Utah State Law. (Polygamy, Utah Code, 1943, 103-51-2 maximum 5 years) (Mann Act—maximum $5000 and 5 years). So if these cases be affirmed we have the federal government imposing a sentence of three years imprisonment on top of a state sentence of five years for the identical offense. That this reasoning is sound as shown by the following quotation from the majority opinion in the Constantine case *supra*:

> "We conclude that the indicia which the section exhibits of an *intent to prohibit and to punish violations of state law as such are too strong to be disregarded, remove all semblance of a revenue act* and stamps the sum it exacts as a penalty. *In this view the statute is a clear invasion of the police power,* inherent in the states, reserved from the grant of powers to the federal government by the Constitution.

*If it be said that petitioners have here referred to books and works not included in the stipulations, it should be remembered that forty-four cases in this matter broke out in this crusade on March 7, 1944, and the ones herein considered came to trial within a few days. The stipulations were drawn in a few hours, and necessarily are not so full and favorable to the defendants as they might have been. The government as the result of months of preparation was able to stress points creative merely of bias and prejudice—the marriage to a baby incident, etc.—; but when the cases were submitted the defendants did submit to the District Court on brief all of the quotations from books herein referred to. The Utah Courts take judicial knowledge of those books; hence we have no hesitancy in adverting to them here.

(7) *We think the suggestion has never been made*—certainly never entertained by this court—*that the United States may impose cumulative penalties above and beyond those specified by state law, for infraction of the state's criminal code by its own citizens.* The affirmation of such a preposition would obliterate the distinction between the delegated powers of the government and those reserved to the states and to their citizens. The implications from a decision sustaining such an imposition would be startling. *The concession of such a power would open the door to unlimited regulation of matters of state concern by federal authority. The regulation of the conduct of its own citizens belongs to the state, not to the United States. The rights to impose sanctions for violations of the state's law inheres in the body of its citizens speaking through their representatives.* * * *"

When it is considered that it is the sole prerogative of the state, not the United States, to place stamp of approval or the contrary upon a form or type of marriage; that neither sovereign has the right to declare upon the verity of a religious dogma or tenet; that these people are being here prosecuted upon a charge of pretended immorality, the determination of which is not possible until the truth or falsity of the "revelation" of God under which they so do shall have been decreed, the force of the above statement of this Great Court is made most apparent, and its application to the cases at bar is shown to be complete.

We are therefore compelled to the conclusion, that the federal courts have no jurisdiction over these White Slave Act cases and this for the reason that the acts complained of are adequately punishable under Utah state law. The Court need go no further in disposing of them, for it should be a matter of policy as well as right that the federal courts may not be used to do double vengeance upon citizens sufficiently amenable to the police powers of their own states. The federal courts have no jurisdiction over these double penalty cases.

The following defendants here are now in the State Prison at Salt Lake City, Utah, serving sentences of five years each for the very acts embraced herein: Heber Kim-

ball Cleveland, David Brigham Darger, and Charles F. Zitting.

THE GRAND JURY CHALLENGE DENIED

Appellants' second Error to be urged, set out at p. 16 of their Application, etc., reads as follows:—

> "The Court erred in affirming the Court's failure and refusal to find that the Grand Jury, finding the True Bill in said cause, was prejudiced and biased against this defendant."

The defendants, severally and together, in each of these matters, duly filed and presented their challenge to the Grand Jury (R. p. 71 et seq.) to which reference is made for full contents.

There it is averred, (and no contradicting affidavit appears), that the Grand Juror Clyde (its foreman) was a high prelate of the dominant "Mormon" Church; that he, together with all of the like officers holding positions in that Church, were under the direct order of the First Presidency of said Church to seek out, and bring to trial, all persons not subscribing to the rule of the Church under the Manifesto of 1890, by which it is claimed its continuance of polygamy was abandoned—specially directing such activities against these appellants.

During the argument on this challenge, Mr. Boyden, the United States prosecutor who conducted all of these matters in the courts below, stated in open court that fully half of the grand jurors, so returning that series of true bills, was of the same faith and position.

We shall not expound at any length upon the force of a priestly edict issued to a priest of a lower order in that Church. Such is regarded by all the lower priests as being the very direction of the Almighty. They act without further order, and assiduously.

Mr. Boyden has further stated into the record that he had the assistance of that dominant Church in Utah in his prosecution of these appellants.

This situation is not new in the history of Utah, although it does appear in the reverse as recorded. Being true in the reverse, it is likewise true when turned about. Upon this, this court has said that it clearly constitutes a bias and a prejudice in a petit juror, and constitutes good cause for challenge to be sustained. See:—

United States v. Miles, 103 U. S. 304, 26 S. Ct. Rep 482* (a)

Reynolds v. United States 96 U. S. 246 (b)

These petitioners never had a chance of any impartial consideration of these matters by the grand jury. At least half of the grand jury entered the box with a prior, fixed, order to return a true bill against them, the preface of which Church mandate reads:

"—*we are willing, and anxious, too,* that such offenders against the law of the state should be dealt with and punished as the law provides. *We have been, and are willing to give such legal assistance as we legitimately can in the criminal prosecution of such cases.* * * * *it is our duty,* as citizens of the country, *to assist in the enforcement* of the law, and the *suppression of pretended 'plural marriages',* * * * *we wish to do everything humanly possible* to make our attitude so clear, definite and unequivocal as to leave no possible doubt of it in the mind of any person." (Italics in-

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* (a) "It is evident from the examination of the jurors on their voir dire, that they believed that polygamy was ordained by God, and that the practice of polygamy was obedience to the will of God. At common law, **this would have been ground for principal challenge of jurors of the same faith.'** See 3 Bl., 303. **It needs no argument to show** that a jury composed of men entertaining such a belief could not have been free from bias or prejudice, on the trial for bigamy, of a person who entertained the same belief and whose offense consisted in the act of living in polygamy.—Whether or not that bias was founded on the religious belief of the juror is immaterial, if the bias existed."

U. S. v. Miles, supra.

(b) " * * * **From the testimony it is apparent that all the jurors to whom the challenge related** were, or had been, living in polygamy. It needs no argument to show that such a juror could not have gone into the jury box free from bias and prejudice, and **if the challenge were not good for principal cause, it was for favor.**"

Reynolds v. United States, supra.

serted)

Under the complete dominance of that order how could a grand juror, be he ever so well intended, act with fairness or impartiality where the charge involved the mentioned "pretended" plural marriages? The very adjective "pretended" is of great significance, without more.

We have contended from the beginning, and we now contend most earestly that: These defendants and petitioners have never had a fair chance for an impartial consideration of their matters by the grand jury that returned these true bills; that the whole grand jury proceeding was, and is, void and against the Constitutional guarantees.

In connection with the petitioners' motions to quash these true bills (R. p. 69), this challenge to the grand jury requires a finding now that the whole proceedings below were unlawful and void.

SHORT SEPARATE DISCUSSION OF THE SEVERAL CASES

The Cleveland cases: Nos. 23, 24 and 25 of this appeal.

Case No. 23 (2945 of Record Index) (R. pp. 1-40) charges this defendant with a single unlawful interstate transportation of Kathryn Lucy Collingwood, from Salt Lake City, Utah, to Evanston, Wyoming,

> "for the purpose of debauchery and for the further immoral purpose, to wit, for the purpose of having sexual intercourse with the aforesaid woman,—and for the further immoral purpose, that the aforesaid woman should be and act as his mistress and concubine"; etc. (R. 1).

The stipulated testimony, as to this woman, relates two other separate travelings interstate of these people, but no charge has been laid for those separate doings. We are therefore properly to consider the charged transportation and the testimony relating to that incident alone in reaching any conclusion in this case. With that in mind, we make the following

SUMMATION OF THE TESTIMONY

The stipulation, (R. 7) shows as to this as follows:

This woman was an adult, trained and practicing professional nurse, employed at a general hospital in Salt Lake City, Utah, when she met this defendant. Coming to believe the doctrine of "celestial" marriage, as originated by the "Mormon" Church, she "married" the defendant under its ceremony and ritual at Salt Lake City, Utah, on the 16*th day of August*, 1941. They immediately engaged in the usual married relations, in Utah, including sexual intercourse, and continued to do so until the 1*st day of November*, 1941, a period of some two and one-half months, when they went together to Evanston, in the State of Wyoming, hired a hotel room, spent the night together, and returned to Salt Lake City, Utah, the next day. While in Wyoming they engaged in their former practice and custom and had sexual relations with each other. They continued so to do in Utah, after their return from Wyoming. The defendant, in so taking this woman to Wyoming, was keeping a prior promise made to her to take her on a "honeymoon", and he supplied the necessary transportation for this trip interstate. We set out in the accompanying footnote the ritual of their "marriage".* (See bottom page 32).

While other statements are set out in the stipulation, we say that the foregoing summary shows the whole of the same properly to be considered in this case.

ARGUMENT

Upon the first charged "purpose":—

This charge of purposed "debauchery" necessarily involves the "guilty mind", the *"mens rea"*, the dire intendment deliberately had in the mind of the defendant, and the determination of the presence or the absence thereof. We refer here to our treatment of that proposition *supra*, in our general arguments, reiterating that we cannot conceive of its being present. Upon this element the religi-

ous state of mind and the sincere belief in the divinity of the requirement of that belief surely have proper application. At all events, had this been his intendment, it was too late at the time of this trip.

Upon the second charged "purpose":

"For the purpose of having sexual intercourse with" this woman. Surely that charge comes rather belatedly. These people had no reason to make this trip for that purpose. No valid reason such as this could be present. They already were free, as between themselves, to do so anywhere. This was an old practice with them, in Utah. Certainly any such act between them while on this trip was but incident to their taking their "honeymoon"—and that was as per prior promise to give the woman a nice trip and a relief from the usual. No such purpose could have ac-

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*The Mormon marriage ritual used in all cases, polygamic or otherwise, is as follows:

"Do you Brother ..... take Sister ..... by the right hand to receive her unto yourself, to be your lawful and wedded wife; and you to be her lawful and wedded husband, for time and all eternity, with a covenant and promise on your part, that you will fulfill all the laws, rites and ceremonies, pertaining to this holy order of matrimony in the new and everlasting covenant, doing this in the presence of God, angels and these witnesses of your own free will and choice?

"Do you Sister ..... take Brother ..... by the right hand, and give yourself to him, to be his lawful and wedded wife for time and for all eternity, with a covenant and a promise on your part, that you will fulfill all the laws, rites and ordinances pertaining to this holy order of matrimony, in the new and everlasting covenant, doing this in the presence of God, angels and these witnesses, of your own free will and choice?

"In the name of the Lord Jesus Christ, and by the authority of the Holy Priesthood, I pronounce you legally husband and wife, for time and all eternity; and I seal upon you the blessings of the holy resurrection, with power to come forth in the morning of the first resurrection clothed with glory, immortality and eternal lives; and I seal upon you the blessings of thrones, and dominions, and principalities, and powers and exaltations, together with the blessings of Abraham, Isaac and Jacob; and say unto you, be fruitful and multiply and replenish the earth, that you may have joy and rejoicing in your posterity in the day of the Lord Jesus. All these blessings, together with all other blessings pertaining to the new and everlasting covenant, I seal upon your heads through your faithfulness unto the end, by the authority of the Holy Priesthood, in the name of the Father, and of the Son and of the Holy Ghost. Amen."

—Mill. Star, Vol. 15, page 44.

tuated this journey. This journey was unnecessary to its accomplishment.

Upon the third charged purpose:

"that the aforesaid woman should be and act as his mistress and concubine."

This charge also comes belatedly, at and under the most severe view. That could not in reason have had anything to do with this journey; for that condition if it may be held to be so was long prior to this trip fully accomplished. It could not have been any part of any actuating motive for this interstate travel.

No one of the "purposes" related in the indictment could have anything to do with this transportation; its motive; its purpose, or the intendment of either of the parties to it. Hence, the Mann Act cannot be called into the matter.

The conviction of this defendant in this case must be reversed. Any "immorality" occurring in Wyoming as a result of this trip was only incidental thereto. It cannot be said to be, in any sense, either the "purpose" or the "reason" for making of the interstate journey.

Case No. 24 (2946) (R. pp. 40-46)

Cleveland v The United States.

The charge here is: that this defendant did transport, interstate, MARCIA COVINGTON, from Salt Lake City, Utah, to Los Angeles, California,

> "for the purpose of debauchery, and for the further immoral purpose, to wit, for the purpose of having sexual intercourse with the aforesaid woman,—, and for the further immoral purpose that the aforesaid woman should be and act as his mistress and concubine,—" etc. (R. 40)

The stipulation (R. 7), covers all of the matters offered as testimony by the Government in this matter. The defendant's plea thereto was "Not Guilty".

Summation of the Testimony

The defendant met this woman some time prior to April, 1942, when she was 17 years of age. No sexual intercourse occurred between them until after his "marriage" with her. *On April 5th* this woman "consented to enter into plural marriage with defendant" *It was agreed that he take her to St. George, Utah, there to be "married"*. When they arrived at St. George, Utah, they found no one to perform the ceremony. *They* thereupon *agreed to go to California, "there to be 'married' by* a member of the cult." Upon their arrival in California they were not actually married and *did not engage in sexual intercourse until consent for such 'marriage' was obtained" from this woman's father.* Thereafter, they were "married" in plural marriage on *the 12th* day of April, 1942, *after* which marriage", they, "spent the evening and night at Hermosa Beach", —, "at an automobile tourist cabin". *"The next day the defendant took Marcia Covington to see some relatives;—Marcia Covington stayed* with these relatives and refused to go further with the marriage."

ARGUMENT

Was the purpose in the mind of this defendant "debauchery", or "marriage" such as he and she both sincerely believed to be the order and command of God? As the opinion of the Circuit Court of Appeals shows (R. 117) it was "marriage" and "living together as husband and wife".

Of course, no contention can be made that any "debauchery" was by the defendant intended. His acts destroy any possibility of that. He took her first to St. George, Utah, "there to be married". No one being at that place to perform the ceremony, they agreed to go on to California "there to be married". He took her to and consulted with her father. Her father consented to the "marriage". He was of the like religious belief with these two people. He had no thought that the "marriage" would "debauch" his own daughter. He believed debauchery was deserving of the death penalty. Still there

had been no sexual intercourse between these people. From the 5th to the 12th days of April, they refrained from any such intercourse though they each knew that that was essential to their full conformity to their religious tenet, the "multiplication of children of good and worthy fathers, who will teach them truth, and train them in holy principles of salvation". (l. s. c.) All of them, father, daughter, this defendant, sincerely believed that "Concubinage is unknown among the Latter-day Saints." (l. s. c.) And so, containing themselves, this defendant and this woman, awaited the sanction of the "marriage", to accomplish which they had made the journey interstate, before they would so much as countenance their sexual union. The defendant, *the very next day* following their "marriage" took this woman to visit her relatives; she remained with them. This shows no depravity comportable with the usual meaning attributed to the word "debauch".

These people never intended to go to California in the first instance. Their joint intent and purpose was to proceed to St. George, in Utah, and there be "married" by a priest of their cult, after which they intended, no doubt, to carry out the mandates and purposes of that marriage. The "marriage" was the primary and actuating purpose of their trip in the first place. Disappointed at St. George, Utah, *they "agreed" to continue on to California and there accomplish their actuating and primary "purpose"* This they did. Certainly, all fair-minded persons must conclude that the "purpose" of their journeying was their "marriage" in form they believed to be the "very command of God". Therefore, the second assigned "purpose" set out in the Indictment, falls. Celestial glory, and the necessary actions to attain the same, as each of them, and her father, believed true, was their primary and actuating motive and purpose. Who are we to question it? We do not even suggest that religious belief gave them a right to practice polygamy, but we do insist that their religious belief removed their actions from the category of prostitution or debauchery.

The "purpose" to have sexual intercourse with this woman, as the actuating motive and "purpose" of the de-

fendant in this transportation interstate disappears.

Now, as to the final alleged "purpose": Let us again refer to Parley P. Pratt, and his statement of the case, (*loc. primo cit.*) of this brief. "Concubinage is unknown among the Latter-day Saints. *Wifehood, in the fullest sense of the word, is conferred by the marriage covenant.*" This defendant fully believed and accepted that statement. Any intent to make this woman his "concubine" or "mistress", consequently, could not possibly reside in his mind. No such conception was in the mind of the women when she "agreed" to this relationship; and, consequently, every intendment or "criminal intent" necessary to the affirmation of the conviction below of this defendant, on this charge, falls.

Case No. 25 (2947) (R. pp. 46-54), *Cleveland* v. The United States.

The charge here is: That this defendant, on the *9th day of August*, 1942, did transport, interstate, MARIE BETH BARLOW, from Salt Lake City, Utah, to Grand Junction, Colorado,

> "*for the purpose of debauchery and for a further immoral purpose, to-wit: that the aforesaid woman should be and become his mistress and concubine*",

Note, *only two purposes charged.*

Let us see what the record shows as to these matters (R. 7), excluding, as we have explained *supra*, all extraneous matter:—

Summation of the Stipulation

She bore a child by defendant on the 10th day of December, 1941. (R. 8). Prior to his living with her he had gone through the religious "marriage" ceremony, a full copy of the ritual of which appears in the footnote (*loc. primo cit.*).

She was fourteen years of age when she so "married" the defendant.

She had been made a ward of the Juvenile Court in Utah, as the result of the birth of this child. Defend-

ant secreted her to avoid the interference with their relationship by the said Juvenile officers, and disclaimed that she was in Utah for that objective.

Her parents believed as did she and this defendant on the subject of "celestial" marriage. They agreed that a divorce be had from defendant's legal wife so that she might become such. This was done.

In September, 1943, she gave birth to a second child by defendant, *after the transportation here charged.* (R. 9.)

Defendant transported her to Grand Junction, Colorado, from Salt Lake City, Utah, on the 9th day of August, 1942, and she there lived with him thereafter *as man and wife.* (He had informed another of these women that his purpose for that bringing her to Colorado was that "she might become pregnant".) He slept alternately with her and another woman thereafter in Colorado, but she did not become pregnant.

On September 18, 1943, she gave birth to another child by defendant, at Salt Lake City, in Utah.

ARGUMENT

Let us consider the "purpose" first alleged; "debauchery" of this woman.

The defendant had "married" her in the year 1941, some time prior to December of that year. Of course, under the beliefs of these people, sexual intercourse, for the purpose of procreation, must have immediately followed.

We believe it idle to argue that the purposes of procreation of children to be reared in the respect and fear of God, might in any sense be held to be an intent to "debauch" their mother. That would be perfectly silly. It would be equally silly to argue that that "purpose" did not underlie the "marriage" of these people, as they conceived it. That "purpose", the propagation and rearing of such children, is an integral part of their religion. They—all of them—believe such to be the very edict of

the Almighty, directed especially to them. We decline to take any such inane position, or enter such a silly discussion. That purpose of these believers is an established fact, the debate of which would be quite inane. A purpose to have children is not what the White Slave Act aims at. That purpose is a concern only of the states. All of the testimony of the Government, here contained in the stipulation, conclusively refutes any such inference of any intent on the part of this defendant to "debauch" or to "debase" this woman. The whole of it, when considered in the light of their communal religious and sincere belief, conclusively refutes any such imputation concerning the "purpose" alleged. There remains no room for any doubt about this, reasonable or otherwise.

Let us pass now to the second alleged "purpose" of this interstate transportation, *on the 9th day of August*, 1942: —to make a "mistress" or "concubine" of this splendid woman.

We readily assent to the proposition that, ordinarily, the particular date alleged as that of the commission of an offense, is somewhat irrelevant, if the crime and its commission be proved at a date approximating that alleged; but, may we observe, here we have a matter where the dates involved have peculiar application.

If there ever did exist in the mind of this defendant any specific intent to subject this mother to the state of "concubine", or "mistress", when did that intent come into being? Was it conceived as a preliminary to the transportation here alleged? Certainly not. That had already been accomplished, if that had been defendant's purpose or intent. The alleged intent to make of this woman a "concubine" or "a mistress", could not have arisen at any time simultaneous with or present in the mind of this defendant at the time of the transportation. If it existed at all it arose long prior to that time, and had been completely accomplished.

In no one of the three cases appears any proof, worthy of the name, of any one of the charged "purposes";

In no one of them appears any act or doing whatsoever, consonant with those dire matters intended by the Congress to be curbed and punished, when it enacted the Mann Act. Everything even remotely shown in these matters has no relation whatsoever to those revolting practices, for profit, and so in "commerce", properly to be regulated by federal enactments, intended by the Congress when it enacted this statute. All are completely foreign to any of the Congressional intendments. And so, not within the purview of the Mann Act.

So much for this series of three of this series of cases so assiduously prosecuted, as the Honorable Judge Kennedy has so potently remarked, "*It is stipulated that the defendant committed said acts as a believer* in the practice of polygamy—and that in so acting he was practicing the original doctrine of his church." (R. p. 15), and "*This* in a way forces the Court to the unenviable situation of sitting in judgment between factions in a Church fight." (R. 23)

And so we say: This defendant cannot be held to have been lawfully and Constitutionally found guilty of any intended violation of the Mann Act, in any one of these three charges and indictments, all being beyond the powers of the Federal Goverment. What he did was a concern of the states alone, for not yet has the federal government been given any power over marriage, nor to punish sincere but illegal marriages. The marriages here were not such tricks or subterfuges as are usually employed by people seeking places for illegal sexual intercourse; they were sincere, binding, religious contracts followed by family life and children, many children. The defendants may be misguided, indeed misinformed concerning which must predominate, a law of man or a law of God, but not even their direst enemies could accuse them of prostitution or debauchery. If their marriages are illegal let the states handle them; for illegal or legal the status they entered was in every respect marriage.

* * * * * *

Case No. 26 (2948) (R. pp. 54-70), *Darger v. The United States.*

The indictment here charges that this defendant transported. interstate, JEAN BARLOW, *"on or about the 17th day of July,* 1942", from Grand Junction, Colorado, to Salt Lake City, Utah, *"for the immoral purpose that the aforesaid woman should be and live* with him as his mistress and concubine"; etc. (R. 54).

The stipulated testimony (R. 56), when condensed, is as follows:—

SUMMATION OF TESTIMONY

During July, 1942, the defendant had two plural "wives" in addition to his legal wife, with which two women he had gone through the religious "celestial" marriage ceremony.

For some time prior to the date of this alleged unlawful transportation, the defendant had been employed as a contractor in Colorado, and there lived with this plural "wife, Jean Barlow" as husband and wife. Leaving his work he took this woman to their home in Salt Lake City, crossing the Colorado-Utah line in so doing. At arrival in Salt Lake City, he resided there with this woman and two other women, likewise his "wives", one being such as recognized by the civil laws, "in a state of plural marriage". The length of his stay at the Salt Lake City home at this time is not shown. He did return to Colorado and completed his work there, after which he returned to his Salt Lake City home and resumed his former state and condition.

ARGUMENT

It appears to us that no fair-minded person could believe that the transportation here could possibly have been to accomplish the charged purpose. All intendment reasonably to be drawn from this testimony is that defendant was doing some work in Colorado, temporarily requiring his residing there; Jean Barlow lived with him there as his "wife"; that work being nearly completed, and for some good reason, she desiring to return to their

home at Salt Lake City, he took her there, and she there stayed while he returned to Colorado; later again coming to and living with her and his other "wives" in Utah.

No purpose to establish this woman as a concubine or mistress can be said to be the actuating motive for the transportation interstate. The purpose was to return her to her Utah home. He did not stay any length of time in Utah; but, we must assume, immediately on returning this woman to her home, returned to his work, finished the same, and came home himself. The only possible purpose which can be said to have brought about the trip to Utah was to return the woman to her home there.

And let it not be forgotten that this defendant, and this woman each sincerely believed that the form of marriage they had entered could not make of her any "mistress"; could not make her a "concubine". Such an intent to degrade her was as far from the mental concepts of these people as can be imagined.

Here, reversal must be had for:

No "criminal intent" is shown;
No "purpose" required by the Mann Act has been shown.

Every intendment must be presumed innocent, until overcome beyond every reasonable doubt by competent evidence. Such presumption has not been so overcome. It has been, if affected at all by the stipulated testimony, thereby fully established.

We submit that this conviction must be reversed.

* * * * * * *

Case No. 27 (2949) (R. 70-78) *Jessop v. The United States.*

The indictment here charges that this defendant, *on the 10th day of July*, 1943, transported, interstate, Mae Johnson, from Short Creek, Utah, to Short Creek, Arizona, "*for the purpose of debauchery*, and for a further *purpose, to-wit, that the aforesaid woman should be and become his mistress and concubine*", etc. (R. 70).

The full stipulation in this matter appears at R. 72. From the stipulation, we make the following

SUMMATION OF TESTIMONY

The defendant "married" this woman in the month of *January*, 1941, under the rite, the form of which appears *supra*. After that "marriage", defendant established two households, one for this woman in the State of Utah, the other for his "legal wife" in the State of Arizona, which said homes were but a short distance apart, viz: about two miles, the state line separating the homes. This establishment continued for some two and one-half years.

That time having elapsed, the legal wife went away from her home, and this "wife" came to the former's home and there stayed and lived with the defendant, so continuing, and not changing anything except her place of residence. The relationship between her and the defendant was not thereby altered, but went on as before. The wife recognized by the civil law was married to the defendant in the year 1926.

This legal wife, at the time of the stipulation made, was the mother of nine children, the defendant being their father.

The other "wife" had but one child, *born April* 7, 1943. The absence of the "legal wife" was for about a week.

During the absence of the "legal wife", the other "wife" came to the absent wife's home and there cohabited with, and was seen in bed with the defendant.

No other testimony, set out in the stipulation, can be of aid in this matter, as we view the same.

ARGUMENT

Let us examine the testimony and ascertain the real purpose underlying the move of this woman across the line and into the other woman's home: The Court must take judicial notice of the "Mormon" teachings on these matters, viz: that the second "wife" comes into the family with the full assent of the first, or legal wife. (Hilton

v. Roylance, 25 Utah 129, 69 P. 660)

We must therefore conclude that in the year 1941, with the assent of the legal wife, the defendant married Mae Johnson; established her in a home but a short distance from that of the legal wife; cohabited with her; had a child by her, which was but three months old at the time of the charged offense. The legal wife, with nine children in the home, went away on a visit. Those children could not be left without someone of adult age in that home. The father required someone to do the housework incident to the continued maintenance of this home in Arizona. The children in that home needed a woman's care. What more natural than for the second "wife" to come to the legal wife's home and do those family essentials, the cooking, the seeing to the cleanliness, etc., etc., necessary there to be done while the mother of those nine children was away? Such would be the same as if an aunt had come to that home and lovingly looked after those youngsters. One is as natural as the other. And such was the motivating reason and purpose for which the second "wife" was brought across the line,—not to accomplish the already accomplished "debauchery", if these facts permit of the application of that term in any sense,—certainly not to accomplish the already long accomplished status of "mistress" or "concubine", if those words may be here applied at all. No, such was not the purpose of that aid given the family of her joint wife.

Any sexual indulgence, if such occurred,—as to which nothing appears with certainty in the record,—between this defendant and Mae Johnson while she sojourned in the Arizona home, cannot be reasonably held to have been the motivating impulse for the coming by her to the Arizona home. There was no need for it, nor any requirement whatever that such transportation be made for any such purpose. Any such sexual indulgence must be reasonably held to have been but an incident to the being there of Mae Johnson,—in no sense the motive impelling her presence there, or her coming to that place.

Hence, we have no "purpose" shown as alleged; or any other purpose cognizable at all under the clear import

and proper construction of the Mann Act. No such crime is made out. As a matter of fact and common sense, the stipulated testimony completely negatives the alleged "purposes" set out in the charge.

When the whole of this matter shall be fully considered, the charge, the plea, the stipulated testimony, and the religious beliefs and concepts of all of the people concerned, looked at and considered as a whole, certainly this conviction must be reversed.

* * * * * * *

Case No. 28, 29 (2953-2954) (*R.* pp. 94-106), Dockstader *and Stubbs v. the United States*

Here the information charges these defendants with the knowing participation as a party principal in the transport, interstate, of one Anna Lindgreen, from Salt Lake City, Utah to Short Creek, Arizona, on or about the 15*th day of July*, 1943, "*for the purpose of debauchery* and for a further immoral purpose, to-wit, that the *aforesaid woman should unlawfully cohabit with Theral Ray Dockstader, one of the defendants herein, as his mistress and concubine*", etc (R. 94)

From the stipulated testimony, (R. 97), we make the following

SUMMATION OF TESTIMONY

As to the defendant Dockstader:

In the fore part of July, 1943, this defendant maintained two homes, one in Salt Lake City, Utah, in which his "wife", Anna Lindgreen, was residing, the other at Short Creek, Arizona, in which his wife, Leah, was living. He had "married" Anna Lindgreen *prior to the month of April*, 1942, considerably more than a full year prior to this transport of her to Arizona, as a believer of and a participant in the ritual hereinbefore set forth, with the attendant beliefs as to the purposes and obligations thereby undertaken, as by that doctrine announced.

We must conclude that Dockstader had, for more than a year prior to this transport, lived with this woman in Utah, as husband and wife; had "cohabited" with her as a

wife; had fully accomplished all possibility of any charge here made, if the same has application, in Utah.

He and Anna, his "wife" in Utah, jointly "made arrangements for this transport with another of the like sincere religious belief as they", (the defendant Stubbs), who it is said "knew that said Theral Ray Dockstader was living in plural marriage with said Anna Lindgreen and Leah Kilpack Dockstader", which it is shown had long been existing, as to Anna, in Utah. Thereafter, and pursuant to their joint engagement of Stubbs, this transport was made of Anna to Arizona, and thereafter, in Arizona, *the long existent relationship* between her and Dockstader *was continued. It was not begun there.* (R. 98)

All of these people, it is stipulated, "professed a belief in plural marriage as a prerequisite to salvation under the original concepts of the Mormon church, * * *." (R. 98)

Now, as to the defendant Dockstader, what was his purpose in removing his "wife" of long standing from Utah to Arizona? Could any reasonable person conclude that the transport was essential to any accomplishment by him of the fell design and purpose alleged in the indictment? We think not. (We can see no purpose disclosed for this taking of his "wife" from Utah to Arizona more damning than to make living with her more convenient or for some other like purpose, financial, perhaps. But, the *real purpose cannot have been that charged.*) That purpose, if ever resident in this defendant's mind, was already an accomplished thing,—a thing long consummated. This trip could add nothing to that.

Now let us look at the stipulation as to the defendant Stubbs: Upon such we make the following

SUMMATION OF TESTIMONY

Stubbs verily believed the religious doctrine of the original Mormon Church, including its tenet of plural marriage. (R. 98)

He was a member of the religious cult to which these de-

fendants all adhered. He transported this woman to Arizona in his truck, with knowledge of her former and intended continued relationship with the defendant, Dockstader, at the joint request of each, Dockstader and Anna Lindgreen. R. 98)

ARGUMENT

All that has been said as to the Defendant Dockstader as to intent, purposes, etc., can be likewise said of this defendant. He knew, as the government's witnesses would have testified, that these two people had long been associated in Utah in the same relationship that they proposed to continue in Arizona. But,—neither here nor with the other defendant,—does any certainly established intent either to debauch or to make a new mistress or concubine of this woman appear as the intent of either defendant. There are literally hundreds of good reasons other than such charged for a removal of a family from one state to another, whether that family be recognized by the laws of the states involved as legal, or otherwise. It still remains, in the minds and hearts of these people, a bona fide and proper family.

And so, this defendant must be likewise held not guilty and his conviction reversed.

* * * * * * *

Case No. 30 (2955) (*R. pp.* 106-115), *Petty v. The United States*

Here the indictment charges a transportation, interstate, by the defendant of one Mary Marguerite Ford, from Idaho into Utah, *on the 11th day of August*, 1943, "for the immoral purpose that the aforesaid woman should be and live with him as his mistress and concubine"; etc. (R. 106)

We make the following

SUMMARY OF TESTIMONY

No testimony was offered by the defendant. The pertinent testimony of the government is contained in the stipulated testimony. (R. 108). It shows:—

Defendant had been and was at the time married, lawfully, to Ivy Campbell Petty, so marrying her in the year 1913. Mary M. Ford, in 1932, was an adult woman, holding a position in a public office in the State of Idaho. She was also doing work for an organization of the Mormon Church. She became acquainted with the defendant and his wife in the year 1934. (R. 108). This defendant's legal wife made a proposal to Mary M. Ford *in* 1934, that she "marry" the husband of the legal wife. Miss Ford, studying and becoming converted to the Mormon doctrine of plural marriage, believed in by each the defendant and his legal wife, in July, 1934, so "married" this defendant at Salt Lake City, Utah. She then returned to Idaho where "she continued to live with her mother", but engaged in sexual intercourse there with the defendant "regularly", in the absence of the legal wife, but at her home and home premises.

She became pregnant, (at what time is not disclosed by the record. We must assume, however, that under the circumstances disclosed, such condition came about rather soon after her "marriage".) Thereupon the defendant removed her to Utah. (This transportation is not any part of or in any sense connected with the crime here charged.) We assume that this move was made in about the year 1935, or late in 1934. She bore defendant three children in Utah, registering their births under the surname "Petty", though other names were shown as to the parents. In *January*, 1943, defendant moved this Utah family from Salt Lake City to Providence, in the same state, where Mary M. Ford, and her children, continued to reside until after the transportation here charged; the defendant *continuing* to live with her there as his wife, and so lived with the said two wives, alternately. (R. 109). In *July*, 1943, "the defendant consented" to her paying a visit to her cousin in Idaho, at the town of Driggs, which is at some distance from Pocatello, Idaho, where the defendant maintained his residence with his legal wife, the defendant supplying her transportation for that purpose. She paid that visit, and after it was ended came to Pocatello, and "*through her mother*" "*got in touch with defendant*". Thereupon, the defendant took her in his car back to her

home in Utah, so crossing the line between Idaho and Utah. No sexual relations were had by them in Utah at that time, though such were proposed by him and refused by her. No sexual relations are disclosed by the testimony of the Government as having occurred between these two people at any time since. He has since refused to support this woman.

ARGUMENT

The testimony of the Government again shows:

This defendant might have been, but for the statute of limitations, charged for his transportation of this woman to Utah in late 1934 or early in 1935. That disappears, however, from this picture. It is but "window dressing", but we have thought proper to include it nevertheless in our summary above. It does disclose the over-ardent efforts of the prosecutors to succeed in this case.

This woman had lived in a home provided for her in northern Utah for a number of years. She continued to reside there at the time of the charged offense here. She was not brought back to it from her visit with her cousin for any purpose other than to get her again to her home. Any attempt to engage in any sexual relations at that time, or later, made by the defendant, were repulsed by her. Such were but incident to their long established relationship and their consonant joint religious beliefs.

Certainly a jury would not have been permitted to have considered this case, had one been impanelled, in the face of motion for dismissal made.

Certainly the fell "purposes" set out in the information here are completely exploded by the government's own testimony.

Certainly no newly arising situation came into being, or was contemplated by this defendant or this woman to be accomplished by this interstate journey. Hence the legal purpose fails to proof, and the case must be dismissed and the conviction reversed.

* * * * * *

Case Nos. 31, 32, 33 (2950-2952) (*R. pp.* 78-94), William *Chatwin v. The United States.*

The indictment here charges this defendant, jointly with Zitting and Edna Christensen, with unlawfully decoying, inveigling and carrying away, Dorothy Wyler, a minor child, aged 15 years, on August 15th, 1941, and thereafter continuously holding said child to the 9th day of December, 1943, and in that period, viz: *on the 1st day of November,* 1941, *transporting said child from Provo, Utah, to Short Creek, Arizona,* etc. (R. 78)

The stipulation (R. 80) may be fairly summarized as follows:—

SUMMARY OF THE TESTIMONY

Chatwin was a widower in 1939. One Lulu Cook resided with him at his home in Utah. (R. 81)

In August, 1940, he sought Dorothy Wyler as a domestic in his home, to which her parents consented. She was then 14 years and 8 months of age. She was subnormal mentally, being of the mental age of 7 *years and* 2 *months, with an I. Q. of* 67. At the time of Chatwin's arrest, she had developed to a "high grade moron with an *I. Q. of* 64, *and a mental age of* 9 *years and* 8 *months.*" She went to his home and was so employed, and she was there taught by both Lulu Cook and Chatwin that "celestial" or plural marriage was essential to her salvation, he relating to her that her grandmother desired her to marry him. She became converted to the doctrine.

After she had come to believe, she became pregnant, and such was discussed by her parents who made complaint to the juvenile authorities, and she was taken into their custody August 8th, 1941. On the 10th of August, 1941, she attended a show with the matron, was there allowed to remain alone, left the showhouse, met two daughters of this defendant, and they supplied her with means to go to Salt Lake City. Arriving there she remained in the home of others of this cult, until the time of the trip to Mexico for her marriage there to this defendant, and subsequent return to Utah, and thence to Short Creek, Arizona. She verily believed that she should abide "by the law of God rather than the law of man". (This is a

religious doctrine accepted by the largest body of the followers of Christ in this world, and is hoary with age, and completely respected.)

These defendants convinced her, (and so she acted) in going to Arizona and there residing with this old gentleman until she had come to her majority, she being pregnant, that she should remain in hiding.

We make no point of the fact that the transportation alleged in the information is not proved as having been begun at Provo, Utah. It appears that an interstate transport was made, but begun at Cedar City, as we read the testimony. It may be that the transport claimed here against these defendants was that from Juarez, Mexico, to Cedar City, Utah. We cannot say. That an interstate transport was made is shown by the testimony, however. Or it may be that the transport claimed is that testified to, from Salt Lake City, Utah, to El Paso, Mexico.

Establishing his new legal wife at Short Creek, Arizona, Chatwin and she lived there for some time; two babies, both perfectly normal children, were born there to them. She became nearly 18 years of age,—was within a very short time of that event, when he was taken into custody under the charges here made.

ARGUMENT

Since when did an elopement with a minor, be she the ward of parents or a juvenile court, constitute the dire offense sought to be charged and punished in this indictment?

There was a perfect willingness in the woman. This old gentleman could not have had any delusions of the new responsibility he was assuming by this marriage. It is significant that he is not shown charged by State authorities with any contribution to any delinquency of this minor, for which the laws of Utah supply ample punishment for him, were he guilty of that offense.

While this girl was "persuaded", or "convinced" that she would be justified in doing as is testified to, it is not

shown anywhere by what means that came about other than discussion of religious tenets and laws. It is not shown in what that "convincing" consisted. Certainly there is not so much as an intimation of force.

Here the girl, now a "high grade moron", was and now is completely competent to know and appreciate her pregnant condition, with all that that entailed, if she remained unmarried. Common sense tells us that that was no small element in her determination to escape and marry this old man, legally. (No one will contend that their marriage was void. At most, it was but voidable. No effort is shown having for its object the disaffirmance of this now completely valid and lawful marriage.)

This lack of showing is as significant as could be anything in this situation.

No,—this old gentleman, having done the decent and manly thing toward this girl, by him pregnant,—married her.

The testimony that he had theretofore "married" her under the "celestial" rite held to be valid in his mind, and in the minds of these fellow defendants, was the factor bringing about his arrest and the charge here.

In the argument before the trial court, where all of this series of cases, and all of these defendants were being discussed, Knox Patterson, Esq., of defense counsel, gave this series of prosecution the appellation: "BOYDEN'S CRUSADE."

We say that, except that this crusade has been initiated, and except for the determination of the prosecutors to reach every one whom they so much as suspected of any practice of "celestial marriage", in which they were actively assisted by the dominant Mormon Church and its priests,—as Judge Kennedy so aptly stated in his opinion: "* * * There was evidently a split in the Church, which is not unusual in all classes of Churches, and the adherents of the polygamic doctrine, calling themselves 'Fundamentalists', to which the defendants purport to belong, have appeared as not only earnest advocates of po-

lygamy, but have practiced it literally. *This in a way forces the Court to the unenviable situation of sitting in judgment between factions in a Church fight.*" (R. 23).—no charge would have been brought in this case. Clearly this elopement,—for it can have no other proper designation,—came to be under the force of that "crusade", a violation of the Lingbergh Act, and the defendants deserving of the death penalty.

There lies the whole of the force of the prosecution here.

We most earnestly urge: The Lindbergh Act could not have been thought to include any such situations by the Congress that enacted it. Hence, this case, and these convictions ought to be reversed.

* * * * * * *

Cases Nos. 32 and 33, Zitting v. The United States,
and
Christensen v. The United States

These two matters are jointly treated, and these two defendants are jointly charged under the same indictment, as is the defendant Chatwin in case. (R. 78)

The stipulation covers them all. (R. 80)

If Chatwin cannot be held to have come within the Congressional intent with respect to the Lindbergh Act, certainly these defendants, who but aided him, cannot be punished thereunder.

We, therefore, adopt the treatment which we have given Case No. 31, supra, as applying here in each of these matters.

* * * * * * *

GENERAL STATEMENT, AS TO EACH OF THE THE ABOVE CASES:

Let it be observed: Not a single one of the women named in this whole series of cases has been shown to have been unwilling. Every one of them, on the contrary, by the government's own stipulated testimony, has been shown to have been equally anxious with her re-

spective "husband", to do as those husbands are here alleged to have done.

The item, under both of these Acts, the Mann and the Lindbergh, as we read those statutes, is an indispensible element necessary to be proved in reverse, viz: That such victims must have been either actually and physically forced, or by trickery, amounting to an overcoming of an independent and contrary mind amounting to a comparable and a similarly condemnable force. None such here appears in any case.

In not a single case does there appear any commercial element.

Not a single instance is shown of any "prostitution" of any woman, for the purpose generally understood where that word is used.

Not a single case of "debauchery", in the generally understood meaning of the word. To find this element present in any of the Mann Act cases, this Court will be required judicially to determine:

The truth or falsity of the religious doctrine and belief of these people, and the "revelation" from which it stems; and

Having so determined, declare their marriage system to be a form of "debauchery". This will stretch that Act to the breaking point, and there will inevitably follow any such declaration, a literal flood of religious cases, involving similar elements sought to be ruled as moral or immoral by the federal courts. The Mann Act, thereby, would be made the instrument of injustice and vengeance feared by those members of Congress debating it, and so a pure police measure, having no real relationship with "commerce", or the delegated power to regulate that activity between the several states.

This illustrates that such a decision, affirming these convictions, or any one of them, will bring into the federal jurisdiction such a great quantity of new litigation as will utterly clog those courts. It will be another federal assumption of state prerogatives.

In every one of these cases an innocent intendment has been clearly shown by the testimony of the government. The pleas of the defendants, thereby, are sustained.

This Court has said, most appropriately, upon the subject of the religious belief of these defendants, and their womenfolk, their families and children:—

> "Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law."
>
> United States vs. Ballard, 322 U. S. 882.

Again, on the subject of mental concepts, and so the matter of intent, this Court has commented:

> "Heart and mind are not identical, Intuitive faith and reasoned judgment are not the same. Spirit is always thought. But in the every-day business of life, secular or otherwise, these variant aspects of personality find inseparable expression in a thousand ways."
>
> Prince v. Commonwealth of Massachusetts, 321 U. S. 158.

* * * * * *

Since the institution of the prosecutions herein the State Courts of Utah have proved that they can handle their polygamy cases without the benevolent interposition of the federal courts, otherwise some of these defendants would not already be in the State Prison; hence the federal government need no longer use its imagination to make kidnaping or prostitution and debauchery out of plain polygamous marriage. Nor need ardent prosecutors belonging to a dominant church further seek to prostitute United States statutes in behalf of that church. The strong arm of the federal government has been lifted out of place, but its blow must not be permitted to strike.

MOTION TO QUASH

This assigned error we have argued under the heading of the Court's failure to find that the challenge to the grand

jury was well taken. What we there say we re-assign here.

The facts here do not show any proper application of either the Mann Act (U. S. C. A. T. 18, Sec. 398) ,or the Lindbergh Act (U. S. C. A. T. 18, Sec. 408a).

There is no showing of the necessary and indispensible criminal intent in any one of these cases.

There can be no lawful finding that any type or form of religious marriage is within the meaning of the words "interstate commerce", which two words embrace every power under each of these Acts.

The matter of regulation, approval, disapproval and ban of all types and forms of marriage, religious particularly, but not exclusively, falls wholly within the police powers of the several sovereign states of this Union. No such police powers, direct or incidentally necessary for the enforcement of either of these acts, resides in the federal government. To hold otherwise requires the declaration that all marriage falls within the definition of "commerce", which cannot be.

The motion to quash should have been granted, *sua sponte*.

THE KIDNAPING CASE

The indictment in the kidnaping case failed to state a public offense in that it did not indicate the purpose of the detention (R. 78). The petitioners moved to quash the said true bill (R. 84) on the ground that it "does not state an offense against the laws of the United States, and in particular does not state an offense under the Sec. 408a, T. 18 USCA". A motion to quash an indictment is a proper mode of taking objection to it for defect of form or substance (United States v. O'Sullivan, D. C. N. Y. 1851) (Fed. Cas. No. 15,974). *This objection was here taken before trial*, but, like a general demurrer, a motion to quash an indictment on the ground that it does not charge facts sufficient to consitute an offense may be made at any time, even after verdict (Cohn v. U. S., C. C. A. N. Y. 1919) 258 F. 355.* Since the indictments are each fatally defective, petitioners urge this objection here

again and move their dismissal.

Furthermore, the indictment is equally defective in that the words "unlawfully inveigled, decoyed and carried away" are wholly conclusions of law and are unsupported by the allegations of any facts to substantiate them. Petitioners have all along maintained that this indictment did not state facts sufficient to constitute a public offense. It is a fatal defect never waived; and, since the indictment is a legal nullity, there is little need for further argument on the Lindbergh case. *To show how serious this objection is, the petitioners are unaware, even at this late date, of what reward, ransom or other benefit the prosecution claims the defendants obtained or had in mind by the transportation, or what unlawful purpose they had in view.* It is doubtless that none existed and that is why the government failed to allege any.

CONCLUSION

In conclusion let us say:

1. In the Mann Act cases, in every instance but one, the petitioner was already married to the woman involved; their relationship was one of respect and love; and there was not the slightest need to cross state lines to have sexual intercourse because that already was existing in their matrimonial lives. In the one case, marriage took place before intercourse. It is true that the marriage, being polygamic, was unlawful under Utah law; nevertheless, to the petitioners it was a sanctified relationship.

2. There was not the slightest evidence of prostitution or debauchery.

3. There was no evidence that the actions of the women were unwilling or involuntary; on the contrary the women gave the fullest cooperation to their marital status.

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*OTHER CASES SUSTAINING THIS STATEMENT ARE:

U. S. vs. Nagle, F. Cas. No. 15,852 U. S. vs. Kuhl, 85 F. 624

U. S. vs. Myatt, 264 F. 442. U. S. vs. Schmidt, 15 F. Supp. 804

All hold that a motion to quash is the proper attack upon an indictment that fails to charge a crime.

4. The evidence is undisputed that the petitioners and the women were acting under what they considered to be a mandate from God.

5. The federal government has no jurisdiction over marriage.

6. By no possible construction of the evidence may the Court find that the petitioners intended to take their spouses into prostitution or debauchery.

7. The rule of *ejusdem generis* compels us to regard "other immoral purpose" in the act to mean either prostitution or debauchery.

8. The petitioners make no claim whatever that, under Utah state law, by reason of their sincere religious belief, they have a right to practice polygamy; but they do maintain that such practice is not within the purview of the Mann Act.

9. The federal government has no jurisdiction to declare upon the verity of any religion; here the "revelation" involved.

10. No declaration of immorality can here be made prior to a judicial determination of the verities of that "revelation".

We respectfully submit that the judgments below should be reversed.

CLAUDE T. BARNES
J. H. McKNIGHT
ED. D. HATCH
O. A. TANGREN,
Counsel for Petitioners.

APPENDIX

THE RELIGIOUS BACKGROUND OF THE DEFENDANTS

Under the charges, we feel that it is essential for the Court to have the full religious background of these defendants.

While *we do not claim that their religious belief can supply any defense upon* the charges as they may be *police regulation violations,* we do say that there is more,—greatly more—than that proposition of police regulations involved here, and that *their sincere religious convictions do have material involvement here upon the requisite showing of an intendment to prostitute* or otherwise debauch or render immoral these women and the family in each case involved.

Unless these prosecutions be held to be in furtherance of an exercise of the police power—which, by the way, was the controling element in the Reynolds case, where the police power did reside in the Federal Government, and where the holding is that the defendant knew of the law prohibiting the practice of bigamy, and his knowing violation of that police law constituted the crime,—then *the mere doing of a forbidden act, when that act is required, as here, to have been incited by an immoral desire and purpose,* fails of sufficient proof until the immoral intendment be proved as resident in the mind of the accused. That is to say: The proof here requires two separate elements to be both alleged and properly proved, viz: (a) the doing of the forbidden act, coupled with (b) an immoral purpose conscientiously resident in the mind of the accused at the time of doing such act. It is in this latter element of required proof that the mental and religious attitudes and convictions come into play with controlling force; hence, we give the following historical background of these accused.

In the early part of the last century, in the remote and comparatively uncultured western section of New York State, Joseph Smith, then a mere lad, declared that he had had actual converse with both the Father and the Son,

and had received instructions from Them how he should thereafter comport himself and what his mission in life was. Of course these statements were scoffed at and he became the butt of ridicule, and finally of persecutions that imperilled his life. He, however, persisted in his declarations, and finally gave his life in forfeit of them, at the hands of a mob at Carthage, Illinois.

In April, 1830, Joseph Smith, and five others, formed the initial organization of the "Mormon" Church. From that small beginning that organization has now grown to have a membership running near 1,000,000 persons, and is now one of the fast-growing religious organizations in these United States.

From its inception to the present, that Church has maintained that Joseph Smith, in very deed, did frequently converse with Heavenly personages, and from them received direct revelations of "the mind and will of God". That Church has no other claim to rightful existence. That claim failing, that great Church must fall,—be found wanting and false. Of course, this Court is not concerned with the determination of either the truth or the falsity of that fundamental element of that Church and that Faith of 1,000,000 Americans. Such a determination is, as is often declared by this Court, no function of, and falls within no jurisdiction of the Courts of either States or the Nation.

In the year 1843, the Prophet Joseph Smith, published one of the many such "revelations" to him, and the same is to be from then on until the present writing, found in that official guide to religion and faith of the "Mormon" people designated the "Doctrine and Covenants", and is to be read in full at Section 132 of that work. Preceding that "revelation" by some two months, there was likewise published in said doctrinal guide the 131st Section.

Each of those Sections has to do with marriage; its form, its continuance, and its nature and kind. Each of these Sections still appears in the "Doctrine and Covenants" and, together with the balance of that book, is officially and universally, adopted and claimed to be believed as being the very word of the Almighty to the "Mormon"

people. The 131st Section reads in part: "In celestial glory there are three heavens or degrees; and in order to obtain the highest a man must enter into this order of the priesthood (meaning the new and everlasting covenant of marriage)."

This 132d Section deals with the doctrine of plurality of wives. It deserves careful reading in connection herewith. It is too prolix to be set out in full. We call especial attention to the following verses of it:—

"1. Verily, thus saith the Lord . . . . .

3. All those who have this law revealed unto them must obey the same; . . . . . 4. and if ye abide not that covenant then are ye damned; for no one can reject this covenant and be permitted to enter in my glory."

61. " • • • If any man espouse a virgin, and desire to espouse another, and the first give her consent; and he espouse the second, and they are virgins, and have vowed to no other man, then he is justified; he cannot commit adultery, for they are given unto him; for he cannot commit adultery with that that belongeth to him and to no one else;

62. And if he have ten virgins given unto him by this law, he cannot commit adultery, for they belong to him, and are given unto him, and *therefore he is justified.*"

It is commonly known among the "Mormons" that this "revelation" was given to that people long prior to its publication in their doctrinal guide; that, among the leaders of that Church, with the Prophet Joseph Smith, the doctrine was accepted and practiced for some years prior to 1843.

It is needless for us to relate the reception this dogma received in their vicinity and among their opponents. We but mention the Mormons leaving of Kirtland, Ohio, where they had established a flourishing community; their hegira to the wilds of Missouri; their being driven

thence by mobs, in the winter and foul weather, and their going to the swampy and undesirable lands later by them named "Nauvoo, The Beautiful", a city then greater in population and place than the then Chicago; their flourishing there, their troubles with their neighbors there; their being driven from that city in the dead of winter, across the ice-covered Mississippi, to starve and freeze, and the deaths of many there from that exposure, women, children and men, young and old; their subsequent journey to the waste-lands of the great Desert, and their founding in that abandoned land, the present State of Utah.

This doctrine of "plurality of wives", maintained by them to be the very word of God, accounts for much of that trouble and woe.

After arriving in Utah, in the year 1852, the great Brigham Young, then successor to the Prophet Joseph Smith, openly announced that they should take up this practice in the entire Church. The people responded, and though many of them groaned from its burden and responsibilities, faithfully married many "wives" at the "command of God". Even today, that early Utah practice must be, and is, by the orthodox "Mormons" defended in its entire morality, and as having been done as aforesaid, "under the direct command of God".

The result was uniform, there in Utah, as elsewhere. This practice enraged their enemies. The result, as all know, was new legislation by the government, then Federal, banning and forbidding that marriage practice.

The "Mormons" resisted those laws with all of their might. Their ecclesiastical leaders went to jail for their violations. Violations, if you please, of pure police measures, properly enacted by the then proper sovereign. These "Mormons" maintained that they, in company with all Christians, notably those of the Roman Catholic persuasion, ought to "obey the laws of God, rather than the laws of Man", where conflicts came into being as to such; maintained that the practice was established as a "law and command of the Almighty", and so struggled against its

banning. Finally, the properties of the Church itself, and they were many and of great value, were confiscated.

By the year 1890, a great crowd of "Mormons", of all degrees, came to believe that it was more politic and more to be desired that they concede their former position and accede to the law. That issue was under constant discussion among the people for a number of years. It finally culminated in the so-called "Manifesto of 1890", under which the then 90-odd-year old President and Prophet, Wilford Woodruff, "said" that he proposed to obey the civil law and "advised" his followers to do likewise.

That "Manifesto" created a great confusion within the Church. Ten thousand of its members, assembled in its next semi-annual Conference, ratified and made that "Manifesto" a rule of the Church. Of the many thousands not so present and so voting, we say little, other than to mention that they were more numerous than those so assembled and so acting. Those not so doing were, also, of divided minds. The "rule of the Church", however, became just that.

Of course, that rule was regarded as not retroactive, and those who had, prior to its adoption, taken many wives continued to cohabit with them as formerly, for many years next succeeding. That such is the case is amply supported by the criminal charges brought, respectively, against the then succeeding President, Joseph F. Smith, and the like proceeding likewise brought against the late President Heber J. Grant, each in the courts of the new State of Utah; each of the accused pleading "guilty", each paying a fine. (See: State v. Joseph F. Smith, and State v. Heber J. Grant, each of record in the courts of Salt Lake County, Case No. 482 in 1899, and Case No. 1618 subsequent.

Following those proceedings, and with the passing of the years, the vigor of the defense of this doctrine, "the very word of God", was gradually lost, until at the present writing, its defense as a binding command has been entirely repudiated by the orthodox sect of the "Mormon" Church, and excommunications of all of these defendants

from that Church because of their unwillingness to do so, antedated the bringing of these prosecutions. Truly these accused are "Fundamentalists" in the "Mormon" faith and doctrine. They maintain, with all of their power, that 'the command' of the Almighty is not abrogated or cancelled by any actions taken by man.'

Such is their faith and sincere belief, so arising and so based and bastioned. This is conceded here.

Simultaneously with the repudiation of this doctrine as a present fundamental of the "Mormon" Church, the leaders of that Church, actually incited this series of prosecutions, and a like series under State law; supplied evidence to the prosecutors, and so compelled these accused to bring the fundamentals of the original and early "Mormon" faith here to be inspected, in order that their state of mind, whether guilty of an intended immorality comparable with prostitution or debauchery, or the like, may be looked into. And this in order that this High Court may determine if they could have had any such intendment while at the same time sincerely believing that they were actually carrying out the direct and specific command of God Almighty, to rear large families of healthy and well-mannered children, establish their family, in plurality, in a position such as will, as they verily believe, bring them all together in the Hereafter in a happy exhalted state.

That is the question here, for the first time presented, and which requires a search of their religious beliefs, practices, and reasons for such and the determination therefrom of that inescapably essential second element of the crimes here charged, viz: their "guilty mind"; their intendment to "prostitute", or to "debauch" those their loved wives, or to kidnap, or the contrary.

Their settled determination to violate a State police measure cannot be said to supply that element.